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8 *Attorney for Tom Horne and*
9 *Tom Horne for Attorney General Committee*

10 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

11 In the Matter Of,

12 TOM HORNE, Tom Horne for Attorney
13 General Committee (SOS Filer ID 2010
14 00003); KATHLEEN WINN, Business
15 leaders for Arizona (SOS Filer ID 2010
16 00375)

No. 13F-CF20120001-MCAO

17 **MOTION TO VACATE HEARING**
18 **AND**
19 **RESPONSE TO MONTGOMERY**
20 **“FINAL DECISION”**

21 Tammy L. Eigenheer
22 Administrative Law Judge

23 The Order of the Administrative Law Judge dismissing this case was a final Order. Under
24 A.R.S. § 41-1095.08, the head of the relevant agency had authority to “accept, reject or modify” the
25 Order (A.R.S. § (10-92.08(D))), but had no authority to send the case back for an evidentiary hearing.
26 Nothing in the statute gives the head of the agency the authority to do any more than “accept, reject or
27 modify” the final Order. Any modification would have to be supported by evidence and subject to
reversal by the Superior Court if the modification was not supported by evidence. The Montgomery
“Final Decision” sends the case back for a hearing; there is no statutory basis for that. It is an illegal
Decision.

It is therefore respectfully requested that the hearing date be vacated and that the
administrative law judge disregard the unlawful Decision, unsupported by any statute.

There are a few other matters that should be on the record.

First, Mr. Montgomery is illegally claiming to be both advocate and judge in this matter.
While an agency can bring a charge, and the head of the agency can act as the judge under the
Administrative Procedure Act, the charge is to be brought by the staff, and the head of the agency

1 should be walled off until it is time to make a decision. In *R.L. Augustine Construction Company v*
2 *Peoria Unified School District No. 11*, 183 Ariz. 393, 904 P.2d 462 (App 1995), Rev'd on other
3 grounds, 188 Ariz. 368, 936 P.2d 554 (1997) the Court reversed a decision by a school board ruling
4 on a contract to which the school district was a party. The Court stated:

5 “The fundamental requirement of due process is the opportunity to be heard
6 ‘at a meaningful time and in a meaningful manner.’” [Citations] This principle
7 requires that a hearing be held before an impartial tribunal. (“[D]ue process
8 demands impartiality on the part of those who function in judicial or quasi-
9 judicial capacities.”). Accordingly, no person may be a judge in his or her
10 own case, or have an interest in the outcome, without there being a violation
11 of due process. [Citations]

12 The requirement of an impartial decision-maker applies with equal force to
13 administrative proceedings. [Citations] 183 Arizona at 464-465 (emphasis added).

14 In *Pavlik v. Chinle Unified School District No. 24*, 195 Ariz. 148, 985 P.2d 633 (App 1999),
15 the Court stated:

16 “In *Augustine*, this court struck down as violative of due process a statute
17 that allowed the school board to preside over a contract dispute to which the
18 board itself was a party. We held that the scheme violated the fundamental
19 rule of due process, that “no person may be a judge in his or her own case.”
20 [Citations]...”That case differs from the one before us because the Board in
21 Pavlik’s case was not a party to the action, but was simply sitting as a court
22 to adjudicate charges preferred against him by a school administration.”
23 195 Ariz. at 152-153 (Emphasis added).

24 In other words, if the school administration brings a charge, and the school board is not itself
25 involved in the bringing of the charge, then the school board can act as a judge even though the
26 school administration works for it. But where, as here, Mr. Montgomery himself personally has made
27 statements to the press indicating that he pre-judged the case, and is acting himself personally as an
28 advocate, then he cannot also serve as a judge. That is the clear implication of the above cited
29 quotation in *Pavlik v. Chinle Unified School District No. 24*, Supra.¹

30 Mr. Montgomery is in the position of a baseball player who struck out at the plate, (this
31 Court’s Order of Dismissal), and now wants to change uniforms, become the umpire, and change his
32 at bat from a strike out to a walk.

33 Finally, the arguments appearing in Mr. Montgomery’s Order have been fully answered in

34 ¹ Montgomery is also improperly attempting to enforce a statute that he has testified is unconstitutional, as
described in a motion not ruled on.

1 advance by the well reasoned decision of this Court. There is one other point to make. Mr.
2 Montgomery argues that the Attorney General's disqualification from participating in a matter also
3 disqualifies all those working in the Attorney General's Office. That is contrary to well established
4 practice. All Attorneys General have routinely been disqualified within the office for matters in
5 which they might have a conflict, and those matters have been handled by the Chief Deputy, by the
6 Solicitor General, or others. For example, in 2009, the Secretary of State sent to the Attorney
7 General's Office an allegation that Terry Goddard had announced that he was running for Governor,
8 and therefore that he should have to resign as Attorney General because it was not his last year in
9 office. Goddard had a conflict of interest precisely the same as that of the Attorney General in this
10 case. Goddard referred the case to Barbara LaWall, the County Attorney of Pima County, and she
11 handled it. No one has ever suggested, as Montgomery now suggests for the first time, that referring
12 the matter out because of a conflict constitutes participating in the decision.

13 It is therefore respectfully requested that the hearing date be vacated, and that Mr.
14 Montgomery's illegal decision be disregarded.

15 Respectfully submitted on this 29th day of March, 2013.

16 /s/ Michael D. Kimerer

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23 ORIGINAL OF THE FOREGOING
24 electronically filed this 29th day of March, 2013,
25 and submitted to:

26 Honorable Tammy Eigenheer
27 Administrative Law Judge
ARIZONA OFFICE OF ADMINISTRATIVE
HEARINGS
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1 COPIES of the foregoing served via OAH
2 electronic filing this 29th day of March, 2013, to:

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By: /s/Melissa M. Wallingsford